



NATIONAL WILDLIFE FEDERATION®

GREAT LAKES NATURAL RESOURCE CENTER®

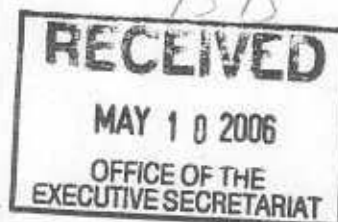
People and Nature: Our Future Is in the Balance

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2006-84

May 5, 2006

VIA CERTIFIED MAIL
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Mr. Stephen L. Johnson
Administrator
United States Environmental Protection Agency
Ariel Rios Building
Mail Code 1101A
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460



Subject: Notice of Intent to File a Citizen Suit under the Clean Water Act

Dear Mr. Johnson:

Pursuant to Section 505(b) of the Federal Water Pollution Control Act ("Clean Water Act" or "the Act"), 33 U.S.C. § 1365(b), this letter provides notice of intent to file suit against the United States Environmental Protection Agency ("EPA") pursuant to Section 505(a)(2), 33 U.S.C. § 1365(a)(2), for failure to perform a nondiscretionary duty required by Section 303(c), 33 U.S.C. § 1313(c), with respect to the State of Wisconsin.

In particular, this letter alleges that EPA has failed to perform its nondiscretionary duty to review, and then approve or disapprove, Wisconsin's revisions to its water quality standards ("WQSs"). The revisions established a new special procedure for granting variances from mercury criteria, and are codified in Wisconsin's Effluent Limitations for Mercury Discharges, at WIS. ADMIN. CODE § NR 106.145.

This notice is provided by the National Wildlife Federation and the Clean Water Action Council of Northeastern Wisconsin (collectively, "the Parties"). The Parties are non-profit corporations working on behalf of their members and the public interest. If litigation proves necessary, the Parties will seek an order compelling EPA to exercise its nondiscretionary duty to review, and either approve or disapprove, Wisconsin's revised WQSs.

I. BACKGROUND

Congress entrusted EPA with important nondiscretionary duties to implement the Clean Water Act and protect the American public from water pollution. The Act requires states to establish, and then revise at least once every three years, WQSs applicable to their waters. 33 U.S.C. § 1313. A state must submit to EPA all adopted or revised WQSs. *Id.* at § 1313(c)(2); 40

C.F.R. § 131.20. EPA has a non-discretionary duty to review a new or revised WQS, whether or not a state submits it to the Agency. *Miccosukee Tribe of Indians of Florida v. EPA*, 105 F.3d 599, 602 (11th Cir. 1997); 33 U.S.C. § 1313(c)(3); 40 C.F.R. § 131.21. If EPA determines that a new or revised WQS meets the requirements of the Act, the Agency must approve it; if EPA determines that the WQS does not meet the requirements of the Act, it must give the state an opportunity to make corrective changes, and must make the changes itself if the state demurs. 33 U.S.C. § 303(c)(3)-(4). EPA's approval or disapproval of a state WQS "shall be based on the requirements of the Act as described in [40 C.F.R.] §§ 131.5 and 131.6, and, with respect to Great Lakes States ..., 40 CFR part 132." 40 C.F.R. § 131.21(b).

Congress also directed EPA to publish water quality guidance ("the Guidance") for all surface waters within the Great Lakes basin. 33 U.S.C. § 1268(c)(2). Pursuant to Section 118 of the Act, EPA published the Guidance, including in it "numerical limits on pollutants in ambient Great Lakes waters to protect human health, aquatic life, and wildlife, and ... guidance to the Great Lakes States on minimum water quality standards, antidegradation policies, and implementation procedures for the Great Lakes System." 33 U.S.C. § 1268(c)(2)(A).

In the Guidance, EPA established a mercury water quality criterion of 1.8 nanograms per liter ("ng/l") for protection of human health, which the Agency made applicable to all waters of the Great Lakes System. 40 C.F.R. § 132.4(d)(3), Table 3 (Water Quality Criteria for Protection of Human Health). In addition, EPA established a mercury water quality criterion, or "Tier I criterion," of 1.3 ng/l for protection of wildlife, which the Agency also made applicable to all waters of the Great Lakes System. 40 C.F.R. § 132.4(d)(4), Table 4 (Water Quality Criteria for Protection of Wildlife), Appendix D.II. ("Table 4 of Part 132 ... contain[s] criteria calculated by EPA.").

The Guidance also includes a number of implementation procedures, including an implementation procedure for granting variances to water quality standards, 40 C.F.R. § 132, Appendix F—Great Lakes Water Quality Initiative Implementation Procedure 2: Variances from Water Quality Standards for Point Sources ("Procedure 2"), and an implementation procedure for determining whether a discharge creates a reasonable potential of exceeding water quality standards, *id.* at Implementation Procedure 5: Reasonable Potential to Exceed Water Quality Standards ("Procedure 5"). The purpose of the implementation procedures is "to translate the [Guidance's] proposed ambient water quality criteria into enforceable controls on discharges of pollutants." Final Water Quality Guidance for the Great Lakes System, 60 Fed. Reg. 15,366, 15,372 (1995).

Congress mandated that that the Great Lakes States "adopt water quality standards, antidegradation policies, and implementation procedures for waters within the Great Lakes System which are consistent with [the] guidance," and charged EPA with reviewing them for consistency. 33 U.S.C. § 1268(c)(2)(C); *see also* 40 C.F.R. § 132.5(g)(3). State implementation procedures must be as protective as the Guidance's implementation procedures. 40 C.F.R. § 132.5(g)(3) & (i).

II. EPA HAS A NONDISCRETIONARY DUTY TO REVIEW, AND EITHER APPROVE OR DISAPPROVE, WISCONSIN'S MERCURY-SPECIFIC VARIANCE PROCEDURE BECAUSE THE PROCEDURE CONSTITUTES A REVISION TO THE STATE'S WATER QUALITY STANDARDS.

On August 26, 2002, Wisconsin adopted "an alternative means of regulating mercury in [Wisconsin Pollution Discharge Elimination System] permits through the establishment of alternative mercury effluent limitations and other requirements" WIS. ADMIN. CODE § NR 106.145. This "alternative mercury effluent limitation ["AMEL"]" represents a variance to water quality standards" *Id.* If a permittee gets an AMEL, Wisconsin's general variance procedure does not apply. *Id.* at § NR 106.145(12).

Contrary to Procedure 2, the AMEL procedure:

- does not prohibit a variance if it would likely jeopardize an endangered or threatened species or adverse modification of its critical habitat,
- does not prohibit granting variances to recommencing dischargers,
- treats dischargers that would be considered new under the Guidance as "existing," and therefore inappropriately eligible for variances, and
- does not require a permittee seeking a variance to demonstrate that any increased risk to human health and the environment associated with the variance is consistent with the protection of the public health, safety, and welfare.

Although Wisconsin consulted with the EPA when drafting the AMEL procedure, EPA has not officially reviewed it or passed judgment on it. The state did not submit the AMEL procedure to EPA for review on the grounds that it is not a variance, but rather a procedure for granting variances. E-mail from Tom Mugan, Wastewater Engineer, Bureau of Watershed Management, Wisconsin Department of Natural Resources, to Neil Kagan, Senior Counsel, National Wildlife Federation (Feb. 4, 2005).

Despite Wisconsin's position, the state's adoption of the AMEL procedure did, indeed, constitute a revision of its WQSs. EPA itself has acknowledged that "requirements pertaining to Implementation Procedure[] 2 ('Variances') ... constitute parts of the [state's] water quality standards." Notice of Proposed Revisions to Approved Programs to Administer the National Pollutant Discharge Elimination System Permitting Program in Indiana, Michigan, Ohio and Wisconsin Resulting in Part from Adoption of the Water Quality Guidance for the Great Lakes System, 63 Fed. Reg. 10, 221, 10,222 (1998).

Furthermore, EPA designed Procedure 2 to allow an exception to the mercury criteria in only limited circumstances. By adopting the AMEL procedure, Wisconsin has caused an imperfect translation of the Guidance's mercury criteria. In effect, the state has expanded the universe of cases in which the criteria are inapplicable, essentially revising the WQSs by limiting their scope. As a result, it has loosened the grip on the discharge of mercury intended by the Guidance.

The undue delay in incorporating mercury water quality-based effluent limitations ("WQBELs") in WPDES permits has a similar effect. Under the AMEL procedure, the DNR will only determine whether a WQBEL is necessary in a permit if the agency has data "consist[ing] of at least 12 monitoring results spaced out over a period of at least 2 years." WIS. ADMIN. CODE § NR 106.145(2)(b)2. This provision is clearly at odds with Procedure 5, which established a procedure for making the "reasonable potential" determination with respect to the mercury Tier I criterion with fewer than ten data points. Procedure 5, § B.1. Moreover, this provision arbitrarily and capriciously postpones the development a WQBEL for mercury where less than twelve monitoring results are available at the time of permit issuance or reissuance.

Based also on these effects of the AMEL procedure, Wisconsin's adoption of the procedure was a revision of the WQSs.¹ When a methodology has the effect of providing less protection than would otherwise be provided by a WQS, "then *in effect* the Rule [establishing the methodology] would have created new or revised water quality standards. *Florida Public Interest Research Group Citizen Lobby, Inc. v. EPA*, 386 F.3d 1070, 1090 (11th Cir. 2004) (emphasis in original). This triggers EPA's nondiscretionary duty of review. *Id.* at 1089.

Finally, EPA's § 118 duty to review a state's compliance with the Guidance is a continuing one. EPA must ensure that a state's water quality standards, antidegradation policies, and implementation procedures remain consistent with the Guidance. If EPA has no continuing responsibility, a state could adopt a variance or reasonable potential implementation procedure that would pass muster under the Guidance, then later adopt a procedure that would be less protective than the Guidance, as Wisconsin has done here. Obviously, that circumvents the Congressional purpose of protecting the Great Lakes System.

III. IDENTIFICATION OF THE PARTIES.

The names, addresses, and telephone numbers of the Parties are as follows:

NATIONAL WILDLIFE FEDERATION
Great Lakes Natural Resource Center
213 West Liberty, Suite 200
Ann Arbor, MI 48104-1398
734-769-3351

CLEAN WATER ACTION COUNCIL OF NORTHEASTERN WISCONSIN
1270 Main Street, Suite 120
Green Bay, Wisconsin 54302
920-437-7304

¹ Because the AMEL procedure also substantially revised the state's National Pollutant Discharge Elimination System program as it pertains to the determination of "reasonable potential" for discharges of mercury, the state and EPA should have, but failed to, follow the procedures prescribed by 40 C.F.R. §§ 123.62 and 132.5.

The Parties and their members are substantially affected by and substantially interested in the water quality of the Great Lakes System. The use and enjoyment of the waters of the Great Lakes system in Wisconsin by the members of the Parties are adversely affected by the AMEL procedure. Specifically, implementation of the AMEL procedure lessens the protection given to the waters of the Great Lakes System (1) perpetuating the toxic mercury pollution of Wisconsin streams, rivers, and lakes, which members of the Parties use as a source of food, for recreation, or for aesthetic enjoyment, or which they would use for such purposes but for the polluted condition of such waters, or (2) increasing the likelihood that Wisconsin streams, rivers, or lakes will become or remain polluted by mercury, interfering with the use and enjoyment of such waters by members of the Parties.

IV. IDENTIFICATION OF LEGAL COUNSEL.

Neil S. Kagan
Senior Counsel
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Great Lakes Natural Resource Center
213 West Liberty, Suite 200
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734-769-3351, extension 38

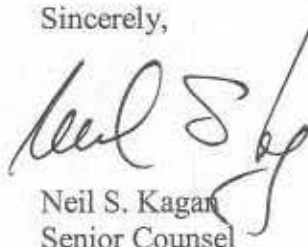
V. EFFECT OF NOTICE.

If EPA's above-described failure to comply with its nondiscretionary duty is not corrected within sixty days, the Parties intend to file suit seeking declaratory relief, injunctive relief, and litigation costs, including attorney and expert witness fees on behalf of themselves, their members, and other interested parties.

The Parties respectfully request the courtesy of a written reply to this notice within thirty days of the date of this letter. Specifically, if EPA believes that the factual allegations set forth in this notice letter are not complete or are inaccurate, the Parties request that EPA provide such information in writing within thirty days.

Should you have any questions, please feel free to contact me at 734-769-3351, extension 38. Thank you for your attention to this matter.

Sincerely,



Neil S. Kagan
Senior Counsel

Mr. Johnson
May 5, 2006
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Cc: Alberto R. Gonzales, Attorney General of the United States
Bharat Mathur, Acting Regional Administrator, EPA Region 5
P. Scott Hassett, Secretary, Wisconsin DNR
Todd Ambs, Water Division Administrator, Wisconsin DNR